IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.19 OF 2007

1.Mannan Shaikh
2.Sayeed Gulab Malik ...Appellants

vs.

1.Govind R.Kalyankar
2.V.S.Vate
3.M/s.Sagar Malkani Builders
and Developers ...Respondents

Ms Vidya Manjrekar i/b Mr.P.M.Havnur for the Appellants
Ms Sarita Dahimile for Respondent No.3

CORAM: A.S.OKA,J.
DATE : MARCH 14,2007.

ORAL JUDGMENT:

1. Heard Advocates for the parties. Notice for final disposal of the Appeal at admission stage has been already issued. Office noting shows that the first and second Respondents are duly served with notice and the third Respondent is represented by an Advocate.

2. The Appeal is by the original Plaintiff. The suit filed by the Appellants was dismissed for default as against the Defendant Nos.1 and 2 by an order dated 26th August 2003. A Notice of Motion was taken out by the Appellants for restoration of the suit. The said Notice of Motion has been dismissed by order dated 8th November 2006.

3. The learned Advocate for the Appellants submitted that the

learned Trial Judge has taken a hypertechnical approach while dealing with the Notice of Motion taken out by the Appellants. She pointed out that there is nothing on record to show that the writ of summons issued to the concerned Defendants was returned unserved. She submitted that in fact the suit was earlier pending for filing written statement of Defendant Nos.1 and 2 and both of them were represented by an Advocate. The learned Advocate for Respondent No.3 submitted that no sufficient cause was made out for restoration of the suit.

4. I have considered the submissions. I have perused the Roznama of the suit. The Roznama of the suit from 20th December 1994 discloses that the second Defendant was represented by an Advocate. The roznama also reveals that even the first Defendant was represented by an Advocate. The Roznama dated 8th January 1996 records that the suit was adjourned to 18th January 1996 for filing the written statement of the first and second Defendants. Entry made on 14th June 2000 in the Roznama discloses that it was not clear whether the writ of summons was served to the first and second Defendants. Roznama dated 11th July 2000 records that only third Defendant has filed the written statement and no other defendant has filed the written statement. There is nothing in the Roznama to show that the writ of summons was returned unserved or that it could not be served as requisite steps were not taken by the Appellants. Therefore, it is obvious

that the suit as against the first and second Defendants could not have been dismissed. In the circumstances, the learned Trial Judge ought to have allowed the Notice of Motion filed by the Appellants and ought to have restored the suit as against the first and second Defendants.

5. Hence, I pass the following order :

i) The impugned Judgment and Order dated 8th November 2006 is quashed and set aside and the S.C.Suit No.7497 of 1994 is ordered to be restored as against the first and the second Defendants.

ii) The learned Trial Judge will issue notice to the said Defendants of the restoration of the suit and will give an opportunity to the said Defendants to file the written statement.

iii) Appeal is disposed of in above terms.

iv) Hearing of the suit is expedited.

JUDGE